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No. 84-1807

IN THE

Supreme Court of the United States

October Term, 1984

GROCERY MANUFACTURERS OF AMERICA, INC.,
a Delaware Corporation,
Petitioner,

v.

JOSEPH GERACE, Commissioner, New York Department of Agriculture and Markets, and THE NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Questions Presented for Review

(1) Did the Court of Appeals for the Second Circuit properly hold that the New York State menu and restaurant disclosure requirements concerning imitation cheese do not impose an unconstitutional burden on interstate commerce?

(2) Did the Court of Appeals for the Second Circuit properly hold that the New York State menu and restaurant disclosure requirements concerning imitation cheese have a fair and substantial relation to a legitimate state purpose and embody distinctions that rationally relate to the object of the legislation?

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Statutes Involved

With the addition of 21 USC § 25 set forth below this party is satisfied with the presentation of the statutes involved as set forth in the Petition for a Writ of Certiorari.

21 USC § 25. Oleomargarine, butterine, or imitation butter or cheese transported into a State subject to its police powers

All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

NOTE: This brief does not set forth a list of all parties, citations to the opinions and judgments delivered in the Courts below, a statement of the grounds on which jurisdiction of this Court is invoked, and the constitutional provisions and regulations involved since this party is satisfied by their presentation in the Petition for a Writ of Certiorari.

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JOSEPH GERACE, Commissioner, New York Department of Agriculture and Markets, and THE NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS,

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BRIEF IN OPPOSITION

Statement of the Case

In 1982, New York adopted Section 63 of the Agriculture and Markets Law which requires, among other things, that consumers be informed when food served to them for carry out or on premises consumption contains imitation cheese or imitation cheese food. This notice must be in the form of a sign that can be read easily by consumers and on

menus, and must be placed on the serving container of an imitation cheese product placed on tables in the establishment.

Regulations implementing this disclosure statute were promulgated by the Commissioner of Agriculture and Markets and appear at Title 1, Official Compilation of Codes, Rules and Regulations of the State of New York, Part 18 (1 NYCRR 18). 1 NYCRR 18.1(e) defines an "imitation cheese" in the traditional way as ". . . a food which is similar in texture, color, flavor, taste and appearance to cheese, or a variety thereof, which is identified, described or defined in Part 17 of this Title, but does not meet a description, identity or definition for cheese as set forth therein". This regulation also sets forth a similar definition for "imitation cheese food" at 1 NYCRR 18.1(d). This is in accord with New York's long-standing construction of the term "imitation". *Dyson* v. *Miles Laboratories, Inc.*, 57 AD2d 197, 394 N.Y.S.2d 86 (3rd Dept. 1977), *Swift* v. *Walkley*, 369 F. Supp. 1198 (S.D.N.Y. 1973). It is also in accordance with the original and long-standing "ordinary meaning" construction given the term by the FDA, (42 Fed. Reg. 25304; 44 Fed. Reg. 76008; 44 Fed. Reg. 76009), until 1973, when it adopted a new definition. New York's definition is in accordance with the construction adopted by this Court in *62 Cases of Jam* v. *United States*, 340 U.S. 593, 599 (1951).

No federal statute or regulation deals with the sale of food *containing* imitation cheese. No federal statute or regulation deals specifically with sign and menu disclosures in restaurants or other food service establishments,

the subject of the petition for certiorari. Federal food labeling requirements are governed by the Federal Food, Drug and Cosmetic Act (FDCA), 21 USC § 301 *et seq.* (1982), and its regulations. Labeling requirements for meat and poultry products are controlled by the Federal Meat Inspection Act (FMIA), 21 USC § 601 *et seq.* (1982), and the Poultry Products Inspection Act (PPIA), 21 USC § 451 *et seq.* (1982), and their respective regulations, 9 CFR § 317 *et seq.* (1984). A federal statute explicitly reserves to the states the power to regulate imitation cheese. (21 USC § 25).

Both the Food and Drug Administration ("FDA") and the United States Department of Agriculture ("USDA") agree that New York's sign and menu disclosure requirements are not preempted by the FDCA, FMIA or the PPIA. (*Grocery Manufacturers of America, Inc.* v. *Gerace*, 581 F. Supp. 658 at 664). Petitioner has not raised a preemption challenge to these disclosure requirements in its Petition for a Writ of Certiorari.

In the United States District Court for the Southern District of New York, 581 F. Supp. 658 (1984), Judge DUFFY noted that there was no doubt that the New York menu and sign posting requirements operate even-handedly since all food stuffs containing imitation cheese are subject to the disclosure requirements. (581 F. Supp. at 670). Since the New York menu and store sign disclosure requirements do not distinguish between nutritionally equivalent and nutritionally inferior imitation products, as the federal regulations do for package labels*, he concluded that New York's regulations do little to effectuate the purpose of the statute. Judge DUFFY thus held that New York's disclosure requirements impose an unconstitutional burden on interstate commerce.

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* See, 21 CFR § 101.3(e).

The Court of Appeals for the Second Circuit, 755 F.2d 993, (1985) reversed that part of Judge DUFFY's decision that invalidated the New York sign and menu disclosure requirements as an unconstitutional burden on commerce. In a unanimous decision, the Second Circuit determined that New York's disclosure requirements further a legitimate local public interest which is not outweighed by any burden on interstate commerce. The Second Circuit specifically found that the District Court had made an erroneous finding of fact that a restauranteur would be unable to determine the information needed to comply with New York State's menu and sign posting disclosure requirements from the disclosures supplied by manufacturers in conformance with federal labeling requirements. (755 F.2d at 1004, n. 7).

The Second Circuit also found "wholly unpersuasive" petitioner's claim that the state's disclosure requirements lack a fair and substantial relation to the object of the legislation and thus violate the Equal Protection Clauses of the federal, United State's Constitution, Amendment XIV, § 1, and the New York Constitution, Article 1, § 11. (755 F.2d at 1005).

Summary of Argument

The decision below, unanimously reversing that part of the decision of the United States District Court for the Southern District of New York concerning New York State's menu and sign disclosure requirements for imitation cheese, is correct. The Court of Appeals for the Second Circuit determined that the District Court's holding was based on an erroneous finding of fact. These disclosure requirements were properly held to serve a

legitimate public purpose and do not impose a burden on interstate commerce. There is no basis for further review by this Court.

ARGUMENT

I

NEW YORK'S MENU AND STORE DISCLOSURE REQUIREMENTS DO NOT IMPOSE AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

It is the intent of Congress to leave states free from the restraints of the Commerce Clause in the area of imitation cheese disclosures. This intent is drawn from the express language of 21 USC § 25 which provides, in part, that:

> [I]mitation cheese, or any substance in the semblance of . . . cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any state . . . and remaining therein for use, consumption, sale or storage therein, shall, . . . be subject to . . . the laws of such state . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

The Senate sponsor of this language emphasized that it was not intended to restrict the power of the states, but rather to expand their authority to reach original packages in interstate commerce. (35 Cong. Rec. 3605). If original packages of imitation cheese and cheese products are within a state's authority to regulate, clearly imitation cheese and cheese foods that have entered a state and are no longer in original packages are within a state's authority to regulate. The petitioner correctly argues that 21 USC § 25 "does not override the Commerce Clause." (Petition for

Writ of Cert., p. 8-9). Indeed, 21 USC § 25 is a clear exercise of congressional authority under the Commerce Clause. It expresses a congressional policy to enhance the regulatory power of the states with respect to imitation cheese.

Separate and apart from the effect of 21 USC § 25, no substantial interstate commerce issue was raised by petitioner. New York's imitation cheese menu and sign disclosure requirements will impact food products produced in New York with the same force as products imported into the state. The Court of Appeals, 755 F.2d at 1003, and the District Court, 581 F. Supp. at 670, both properly concluded that "the New York law regulates evenhandedly". Petitioner's reliance on *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. ——, 82 L. Ed. 2d 200 (1984), *Voight* v. *Wright,* 141 U.S. 62 (1891), and *Brimmer* v. *Rebman,* 138 U.S. 78 (1891), is misplaced. Those cases struck down local taxes or fees that imposed an unreasonable burden on interstate commerce. No such taxes or fees are involved with the New York disclosure requirements. Unlike those invalid taxes and fees the New York disclosure requirements offer no advantage to a local producer over an out-of-state producer. The Second Circuit found that the only affidavit supporting petitioner's claim that New York's disclosure requirements would cause a purchasing shift from imitation to real cheese was from an establishment located in New York State. (755 F.2d at 1004).

Further undercutting petitioner's argument that these disclosure requirements would have an impermissible burden on interstate commerce is the finding of the Second Circuit below that ". . . to the extent that they indirectly advantage the dairy industry, that effect is not necessarily limited to in-state dairy producers." 755 F.2d at 1003.

The Court also found that: "Some cheese alternatives contain a percentage of real cheese; many are made with dairy products. Thus, any disadvantage to the alternative cheese product manufacturers may have a similar impact on at least some segment of the New York dairy industry." (755 F.2d at 1003, n. 6). The petition selectively quotes from the Commissioner's memorandum in support of the bill in an attempt to characterize the bill as a protectionst measure. (Petition for Writ of Cert., at 11). In fact, the Commissioner wrote that the bill "will fill an important gap in the protection afforded to consumers of products containing imitation cheese." (Petition for Writ of Cert., at 9b). The Commissioner concluded that "This bill makes a major contribution toward insuring that synthetic food products will not be fraudulently or unfairly passed off on the public as natural cheese or cheese products." (Petition for Writ of Cert., at 11b).

The New York disclosure requirements have the neutral objective of permitting imitation cheese to compete fairly with real cheese by providing consumer information that will allow consumers to make an informed choice. The Second Circuit correctly found that the New York statutes regulate evenhandedly within the bounds of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

The New York requirements are also wholly in line with the holding of this Court in *Metropolitan Life Insurance Company* v. *Ward*, 53 U.S.L.W. 4399 (U.S. Mar. 26, 1985, No. 83-1274), which invalidated a state insurance statute that sought ". . . to benefit domestic industry within the state only by grossly discriminating against foreign competitors." (53 U.S.L.W. at 4401). No such discrimination is present here.

II

INFORMING CONSUMERS IN RESTAURANTS AND OTHER FOOD SERVICE ESTABLISHMENTS THAT IMITATION CHEESE HAS BEEN SUBSTITUTED FOR REAL CHEESE IS A LEGITIMATE EXERCISE OF STATE POWER.

A New York consumer of restaurant food in a food service establishment has no practical means of determining if the food being offered contains real cheese or an economically inferior, and perhaps nutritionally inferior, cheese substitute unless disclosures are given on menus, signs and serving containers. The Second Circuit below acknowledged that New York's menu and store sign disclosure requirements ". . . are intended to prevent deception and unfair competition, to promote honesty and fair dealing and to permit consumers to clearly discern whether they are buying real cheese. We believe that the sign, menu and container provisions effectuate a legitimate, local public purpose." (755 F.2d at 1004).

The Petitioner disputes this holding. It asserts in its petition, at pages 10 and 11, that these disclosure requirements lack a fair and substantial relationship to any legitimate interest and subvert the federal interest of informing the consumer since consumers will be misled into believing that the product served in a restaurant is inferior to the identical product sold in a grocery store. This assertion is based on rank speculation. No consumer surveys or other evidence was introduced below to show what degree, if any, customers are even aware that package disclosures make a distinction between imitation cheese

products that are deemed to be nutritionally equivalent with real cheese and imitations that are deemed to be nutritionally inferior. No evidence was introduced to establish Petitioner's assertion that restaruant patrons would be confused by the New York disclosures. This assertion of fact remains merely an assertion.

Petitioner is also in error when it argues that " . . . the categories created are more dependent upon the place of sale than the content of the product." (Petition for Writ of Cert., at 9).

An identical form of disclosure on package labels and restaurant signs and menus is not necessary to avoid consumer confusion. The needs of a consumer, when making a food product selection in a grocery, are quite different than those of a consumer when making a food selection from a menu or restaurant sign. The labels on packaged food contain an ingredient list. Menus and restaurant signs do not.

This case is clearly distinguishable from that presented in *American Meat Institute* v. *Ball*, 550 F. Supp. 285 (W.D. Mich. 1982). Michigan required store signs to disclose compliance with state meat quality standards. Petitioner sets forth that case for the proposition that no legitimate interest is served by a state statute requiring the posting of a sign that substitutes one form of incomplete information about a product for another. (See Petition for Writ of Cert., at 10). Those disclosure requirements were held to be invalid because the disclosures were wrong, not because they were different. This is not the situation presented here.

The Second Circuit also pointed to evidence in the record below that demonstrated a strong disagreement among nutrition professionals concerning the intrinsic value of the federal nutritional guidelines applicable to imitation cheese products. (755 F.2d at 1003 and 1004). That Court found that "[t]he very existence of this controversy persuades us that New York's nutritional concerns are not unreasonable". (755 F.2d at 1004). The equal protection challenge of petitioner cannot prevail ". . . so long as the question of rational relationship is 'at least debatable'." (*Metropolitan Life Insurance Company* v. *Ward,* 53 U.S.L.W. 4399, 4402 (Mar. 25, 1985, No. 83-1274) (citing, *Western & Southern Life Ins. Co.* v. *State Board of Equilization of California,* 451 U.S. 648, 674 (1981)). The relationship of New York's disclosure requirements are more than debatable, a rational relationship exists in its intent and application.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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